

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RIC LOGG, et al.,

Plaintiffs,

v.

TIG INSURANCE CO., et al.,

Defendants.

Case No. 3:21-cv-5280-DGE-TLF

ORDER RE: PLAINTIFFS' MOTION
TO EXCLUDE EVIDENCE, AND
PLAINTIFFS' MOTION FOR
SANCTIONS

This matter comes before the Court on plaintiffs' motion to exclude all evidence and witnesses undisclosed by defendant TIG Insurance Company ("TIG") and issue sanctions to TIG Pursuant to Federal Rules of Civil Procedure 11, 26(a)(e)(g), and 33(b). Dkt. 126. This matter has been referred to the undersigned Magistrate Judge. *Mathews, Sec'y of H.E.W. v. Weber*, 423 U.S. 261 (1976); 28 U.S.C. § 636(b)(1)(B); Local Rule MJR 4(a)(4). For the reasons set forth herein, the Court **DENIES** plaintiffs' motions without prejudice.

FACTUAL BACKGROUND

On February 14, 2022, TIG produced its initial disclosures. Dkt. 118, Ex. 26 (Seventh Declaration of Todd Skoglund). On June 10, 2022, TIG produced a redacted copy of the claim file and policies, along with a privilege log. Dkt. 129, Ex. B, C (Declaration of Matt Erickson to TIG's Opposition to Motion to Exclude). Although these motions are not properly brought at this time, the Court recognizes it is possible that, if

1 the case moves past the summary judgment stage and issues are set for trial, motions
2 in limine may be filed later, and the underlying issues may again become relevant to the
3 motions in limine.

4 On July 1, 2022, TIG served its disclosure of Expert Witnesses, naming Danette
5 K. Leonhardi as an expert in claims handling practices. Dkt. 129, Ex. D. On July 8,
6 2022, TIG served its Disclosure of Rebuttal Witnesses, and reserved the right to name a
7 construction expert to testify regarding the construction of homes in the Vintage Hills
8 Development. *Id.* at Ex. E. TIG also disclosed “RiverStone Employees identified in the
9 claim file” and “Other RiverStone Employees” as hybrid fact and expert witnesses, and
10 listed TIG’s former counsel, Lane Powell, as the contact for the RiverStone Employees.
11 *Id.*

12 On August 23, 2022, TIG served its responses to plaintiff’s discovery requests.
13 *Id.*, Ex. F. On November 3, 2022, TIG produced supplemental answers to certain of
14 plaintiffs’ interrogatories, and informed plaintiffs that TIG and RiverStone relied on
15 Highmark’s defense counsel from the firm Gillaspay & Rhodes to provide information
16 regarding litigation of the underlying matter. Dkt. 127, Ex. 1 (Ninth declaration of Todd
17 Skoglund). On November 29, 2022, TIG produced separate supplemental answers to
18 plaintiffs’ interrogatories and provided the identities and a brief description regarding five
19 individuals who played a role during the lifecycle of the claim at issue. Dkt. 129, Ex. G.

20 The deadline for discovery motions expired November 25, 2022, and the
21 discovery deadline expired on December 2, 2022. Dkt. 75.

22 On January 19, 2023, TIG produced an additional 525 Bates-numbered pages of
23 documents responsive to plaintiffs’ discovery requests. Dkt. 129, Ex. H.

DISCUSSION

Plaintiffs' motions regarding discovery are untimely; the deadline for discovery motions was November 25, 2022. See Dkts. 60, 75. The Court will nevertheless briefly address the issues raised in plaintiffs' motions.

1. Discovery Sanctions

Federal Rule of Civil Procedure 26(a)(1) requires a party to provide the "name...of each individual likely to have discoverable information" – and subjects of that information – that a party "may use to support its claims or defenses" as a part of its initial disclosures. Fed. R. Civ. P. 26(a)(1)(A)(i). Additionally, a party who has made a disclosure under Fed. R. Civ. P. 26(a) must supplement or correct its response in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect. Fed. R. Civ. P. 26(e)(1)(a).

When a party fails to provide requested discovery that falls within the scope of Rule 26(b)(1), Fed. R. Civ. P. 37(a)(1) allows the requesting party – after giving notice to other parties and attempting to resolve the dispute by a meet and confer – to "move for an order compelling disclosure or discovery." Rule 37(c)(1) forbids the use of any improperly disclosed information in a motion, at a hearing, or at trial. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); Fed. R. Civ. P. 37(c)(1) ("[i]f a party fails to provide information or identify a witness as required under Rule 26(a) ..., the party is not allowed to use that information").

Two exceptions "ameliorate the harshness of Rule 37(c)(1)." *Id.* The material may be used if the party's failure to properly disclose was "substantially justified" or "harmless." Fed. R. Civ. P. 37(c)(1); *Merchant v. Corizon Health*, 993 F.3d 733, 740 (9th

1 Cir. 2021). The party making the late disclosure bears the burden of establishing that
2 the failure to disclose was substantially justified or harmless. *R & R Sails, Inc. v.*
3 *Insurance Co. of Pennsylvania*, 673 F.3d 1240, 1247 (9th Cir. 2012). If the exclusion of
4 such evidence would be a sanction that amounts to dismissal, then the district court is
5 required to consider “whether the claimed noncompliance involved willfulness, fault, or
6 bad faith.” *Id.* Rule 37(c) is intended to be a “self-executing, automatic sanction to
7 provide [] a strong inducement for disclosure of material.” *Yeti by Molly, Ltd.*, 259 F.3d
8 at 1106 (citing Fed. R. Civ. P. 37 Advisory Committee's Note (1993)) (quotations
9 omitted).

10 Plaintiff alleges that (1) TIG failed to contact Gillaspay & Rhodes or RiverStone for
11 information and documentation before answering discovery, and (2) TIG's responses to
12 the interrogatories failed to comply with FRCP 26(b)(1) because it failed to produce
13 names or contact information for a RiverStone employee, and the information is not in
14 its production, Dkt. 126 at 9, 11.

15 With respect to plaintiffs' first point, TIG argues that even if there was a delay in
16 the production of some materials, there is no prejudice or surprise to plaintiffs because
17 the discovery was provided within sufficient time. Dkt. 128 at 7. Regarding plaintiffs'
18 additional points, TIG responds that the alleged failure to specify names and contact
19 information of RiverStone employees is harmless and/or substantially justified because
20 the employee names are in the materials produced, TIG advised plaintiffs that
21 RiverStone employees could be contacted through TIG's [then] counsel Lane Powell,
22 and plaintiffs could have contacted TIG's counsel regarding service on these
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1 employees, rather than attempting to serve them at their personal addresses. Dkt. 128
2 at 7-8.

3 Plaintiffs' request for exclusion of "all evidence not found within [TIG's] first
4 document disclosure and subsequent discovery responses in which TIG limited the
5 homeowners" does not identify any specific items of evidence that plaintiffs contend
6 should be excluded. The Court declines to speculate about the evidence plaintiffs seek
7 to exclude – plaintiffs' motion for exclusion of evidence and witnesses is therefore
8 **DENIED** without prejudice.

9 Regarding whether sanctions are warranted under FRCP 37(c) for any violation
10 of FRCP 26(a)(1) – based on the record currently before the Court, any delay in
11 producing documents or identifying witnesses appears to be harmless. TIG's most
12 recent response to plaintiffs' discovery request was produced after the discovery
13 deadline; but the rules allow parties to supplement their disclosures, Fed. R. Civ. P.
14 26(e)(1)(a). And plaintiffs do not specify what evidence they desire the Court to exclude.
15 Plaintiffs contend that arguments presented by plaintiffs in their motion for summary
16 judgment would not have been available had they not known about the fact that
17 RiverStone fired Gillaspy & Rhodes. Dkt. 126 at 14. Because plaintiffs *did* have access
18 to these facts and included them in their motion for summary judgment, there is no
19 evidence that the late disclosure was harmful to plaintiffs.

20 2. Rule 11 Sanctions

21 Plaintiffs' request for Fed. R. Civ. P. 11 sanctions fails to comply with the "strict
22 procedural requirements" of Rule 11. *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772,
23 788 (9th Cir. 2001). Specifically, Rule 11(c)(2) states that the motion for sanctions "must
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1 be served under Rule 5, but it must not be filed or be presented to the court if the
2 challenged paper, claim, defense, contention, or denial is withdrawn or appropriately
3 corrected within 21 days after service or within another time the court sets.” Fed. R. Civ.
4 P. 11(c)(2). The Ninth Circuit has made clear that the purpose of Rule 11(c)’s safe
5 harbor provision “is to give the offending party the opportunity . . . to withdraw the
6 offending pleading and thereby escape sanctions.” See *Barber v. Miller*, 146 F.3d 707,
7 710 (9th Cir. 1998). Moreover, Fed. R. Civ. P. 11(d) states that “[t]his rule does not
8 apply to disclosures and discovery requests, responses, objections, and options under
9 Rules 26 through 37.”

10 Here, plaintiffs’ motion is clearly related to discovery issues. Fed. R. Civ. P. 11(d)
11 does not permit discovery motions to become the subject of a Rule 11 motion. And
12 plaintiffs failed to provide notice of their intent to seek FRCP 11 sanctions within 21
13 days. Dkt. 126 at 11. Plaintiffs also failed to follow the Western District of Washington’s
14 Local Rule concerning motions for orders compelling discovery. LCR 37. Therefore,
15 plaintiffs are not entitled to sanctions under Fed. R. Civ. P. 11, 26, or 37. See *Radcliffe*,
16 254 F.3d at 789. Plaintiffs’ motion for sanctions is therefore **DENIED** without prejudice.

17 CONCLUSION

18 For the reasons stated herein, the Court **DENIES** plaintiffs’ motion to exclude
19 undisclosed evidence and witnesses, without prejudice; and **DENIES** the plaintiffs’
20 motion for Rule 11 sanctions without prejudice.

21 Dated this 12th day of June 2023.

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23 Theresa L. Fricke
24 United States Magistrate Judge